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No. 496

In the Supreme Court of the United States

OCTOBER TERM, 1932

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERNEST BROOKS, HAROLD WILSON BROOKS, AND WALTER DOUGLAS BROOKS, AS EXECUTORS OF THE WILL OF ERNEST AUGUSTUS BROOKS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and regulations involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	4
Appendix (statutes and regulations)	10

CITATIONS

Cases:	
Baldwin v. *Missouri*, 281 U. S. 586	8
Beidler v. *South Carolina Tax Commission*, 282 U. S. 1	8
Brewster v. *Gage*, 280 U. S. 327	6
Cook v. *Tait*, 265 U. S. 47	9
De Ganay v. *Lederer*, 250 U. S. 376	5
Eidman v. *Martinez*, 184 U. S. 578	5
Farmers Loan & Trust Company v. *Minnesota*, 280 U. S. 204	8
First National Bank of Boston v. *Maine*, 284 U. S. 312	8
Garvan, Estate of John Joseph v. *Commission*, 25 B. T. A. 612	9
National Lead Co. v. *United States*, 252 U. S. 140	6
Stearns, Marshal, Administrator of the Estate of Carl Richard Heironymus v. *United States*, No. 41865, Court of Claims	9
United States v. *Bennett*, 232 U. S. 299	9
Wheeler v. *Sohmer*, 233 U. S. 434	5
Statutes:	
Revenue Act of 1916, c. 463, Sec. 202 (c), 39 Stat. 756, 778	8
Revenue Act of 1918, c. 18, Sec. 403, 40 Stat. 1057, 1098	6
Revenue Act of 1921, c. 136, Sec. 403, 42 Stat. 227, 279	6
Revenue Act of 1924, c. 234, 43 Stat. 253, 303, 304, 305—	
Sec. 301 (U. S. C., Title 26, Sec. 1092)	10
Sec. 302 (U. S. C., Title 26, Sec. 1094)	10
Sec. 303 (U. S. C., Title 26, Sec. 1095)	10–11
Revenue Act of 1926, c. 27, 44 Stat. 9, 72—	
Sec. 303 (U. S. C. App., Title 26, Sec. 1095 (b))	6
Miscellaneous:	
Treasury Decision 2530	8
Treasury Regulations 37, Art. 60	5, 6
Treasury Regulations 63 (1922 Ed.), Art. 53	5, 6
Treasury Regulations 67, Art. 18	8
Treasury Regulations 68—	
Art. 11	11
Art. 50	5, 6, 8, 12
Treasury Regulations 70 (1926 Edition), Art. 50	6
Treasury Regulations 70 (1929 Edition), Art. 50	6

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DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above case on August 5, 1932. (R. 49.)

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 11–21) is reported in 22 B. T. A. 71. The opinion of the Circuit Court of Appeals (R. 45) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 5, 1932. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under Sections 301, 302, and 303 of the Revenue Act of 1924, the gross estate of a nonresident decedent should include the value of intangible property the physical evidences of which are actually present in the United States.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved appear in the Appendix, *infra*, pp. 10–12.

STATEMENT

The facts found by the Board (R. 8–11) may be summarized as follows: Respondents' decedent was a subject of Great Britain, and at the time of his death on October 31, 1924, was a resident of Cuba. At that time he owned securities which were located in New York City. (R. 8.) He was not then engaged in business in the United States (R. 8) and the securities were not pledged, hypothecated, or held as security for any indebtedness (R. 11). Some of the securities were in the possession of the decedent's son in New York City. (R. 11.) They had been held by him for several

years, his father having asked him to take charge of the securities, collect the interest, and deposit it to the decedent's account in a New York bank. (R. 36.) The remainder of the securities were in the possession of Lawrence Turnure & Company, in New York City, which collected the income and placed it to the decedent's credit in a drawing account, against which the decedent from time to time drew checks. The company made a charge for the services rendered in this connection. (R. 11.)

The securities consisted of the following (R. 8–11):

Bonds of foreign corporations and accrued interest thereon	$24,384.97
Bonds of foreign governments and accrued interest thereon	55,610.49
Bonds of domestic corporations and accrued interest thereon	460,315.32
Bonds of a domestic municipality and accrued interest thereon	15,073.57
Stock in a foreign corporation	50,000.00

At the time of his death the decedent also had cash on deposit with Lawrence Turnure & Company, New York City, in the amount of $14,517.98. (R. 8.)

The Commissioner included the above property in determining the value of that part of the gross estate of the decedent which at the time of his death was situated in the United States. (R. 11.) The Board held that this property was erroneously included in the gross estate (R. 21) and its decision was affirmed by the court below (R. 45–47).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In failing to hold that the stocks, bonds, and cash on deposit were property situated in the United States within the meaning of Section 303(b) of the Revenue Act of 1924.

2. In holding that the Revenue Act of 1924 did not require the inclusion in the gross estate of a nonresident decedent of the value of intangible property the physical evidences of which are actually present in the United States.

3. In affirming the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The matters decided by the court below are of unusual importance in the administration of the revenue laws. From an examination of the last 1,745 nonresident cases finally closed, the Treasury Department has estimated that more than $1,000,000 in estate taxes will be subject to refund if the present decision is allowed to stand, and future collections from nonresident estates will be reduced by approximately 17%. The decision of the court below, if allowed to stand, will result in much litigation with respect to those estates which are not finally closed.

2. The construction of the statute adopted by the court below defeats the apparent purpose of Congress to reach the transfer of every kind of property within its power. When the statute was en-

acted it was settled that there was power to deal with intangibles on the footing of a situs separate from that of their owner (*Eidman* v. *Martinez,* 184 U. S. 578, 582; *Wheeler* v. *Sohmer,* 233 U. S. 434, 439), and under a statute fairly comparable to the one here involved this Court had decided that intangibles physically held in the United States by an agent under a power of attorney from a nonresident alien was property within the United States (*DeGanay* v. *Lederer,* 250 U. S. 376, 382).

3. The decision of the Circuit Court of Appeals that Congress did not intend to include in the gross estate of a nonresident decedent the intangibles owned by him and situated in the United States, is opposed to the consistent administrative construction of the Revenue Acts, at least so far as bonds are concerned. Bonds comprise the main portion of the estate in this case. Article 60 of Treasury Regulations 37, applicable to the Revenue Act of 1918, provided that "Bonds actually situated in the United States, moneys on deposit with domestic banks and moneys due on open accounts by domestic debtors constitute property subject to tax." Article 53 of Treasury Regulations 63 (1922 Edition), applicable to the Revenue Act of 1921, provided that "Bonds actually within the United States, moneys due on open accounts by domestic debtors and stock of a corporation or association created or organized in the United States, constitute property having its situs in the United States." Article 50, Treasury Regulations 68, applicable to the Revenue

Act of 1924, which is here involved, provides as follows:

> Real estate within the United States, stocks and bonds physically in the United States at date of death, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having a situs in the United States. * * *

Article 50, Treasury Regulations 70 (1926 Edition), applicable to the Revenue Act of 1926, and Article 50 of Treasury Regulations 70 (1929 Edition), applicable to the Revenue Acts of 1926 and 1928, have added bills, notes, and mortgages to the list of intangibles having a situs in the United States.

These regulations have been impliedly sanctioned by the repeated reenactment of the statute upon which they rest. Section 403 (b), Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1098) and 1921 (c. 136, 42 Stat. 227, 279); Section 303 (b), Revenue Acts of 1924 (*infra*, p. 9) and 1926 (c. 27, 44 Stat. 9, 72; U. S. C. App., Title 26, Sec. 1095). Upon well-settled principles these regulations have the force of law and are not to be disregarded without cogent reasons. *National Lead Co.* v. *United States*, 252 U. S. 140, 146; *Brewster* v. *Gage*, 280 U. S. 327, 337.

Until 1924 the Treasury regulations did not specifically include stock of a foreign corporation among the classes of intangible property having situs in the United States. Treasury Regulations

68, Article 50, applicable to the Revenue Act of 1924, provide, however, that "stocks and bonds physically in the United States at date of death * * * constitute property having a situs in the United States." The Revenue Act of 1926, Section 303 (b), *supra,* reenacted the statute to which the above regulations related, and thus, by inference, indicated congressional approval of the administrative interpretation. The earlier regulations (see Regulations 37, Article 60, and Regulations 63 (1922 ed.), Article 53) did not expressly limit the estate tax to the classes of intangible property mentioned and the failure of these regulations to mention stock of foreign corporations can not limit the purpose of Congress to tax all property within the reach of the statute.

Section 303 (e) of the 1924 Act, *infra,* expressly excepted from the scope of the statute the amount receivable as insurance upon the life of a nonresident decedent and bank deposits of a nonresident decedent not engaged in business in the United States. The implication is that other intangibles similarly situated and not so excepted shall be deemed to be property within the United States.

Section 303 (d), *infra,* provides that "stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States." The court below erroneously concluded that the application of the maxim *expressio unius est exclusio alterius* excluded other intangibles. The maxim does not apply, for it is clear that

Congress, rather than limiting the operation of the statute, extended it to insure the inclusion of domestic stock wherever it was held, whether or not physically present in the United States. This appears to have been the construction put upon Section 202 (c) of the Revenue Act of 1916, c. 463, 39 Stat. 756, 778, of which Section 303 (d) of the 1924 Act is a counterpart. See Treasury Decision 2530. The 1924 Act was similarly interpreted. Article 50, Regulations 68; cf. Article 18, Regulations 67. Unless Section 303 (d) applies to domestic stock *wherever located* Congress would have had no reason to make it inapplicable to a tax upon gifts of property *situated within the United States.* Section 303 (d) was made inapplicable to the gift tax by limiting it to "Part I of this title."

(4) One of the judges of the court below concurred in the result reached by the majority because he believed the construction of the statute for which we contend would raise a grave constitutional question. Recent decisions of this Court rendered since the enactment of the applicable statute,[1] holding that the situs of intangibles is at the domicile of the owner for the purpose of State taxation, have raised doubt as to the power of Congress to include in the gross estate intangibles of

[1] *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1; *First National Bank of Boston* v. *Maine*, 284 U. S. 312.

nonresident decedents situated in the United States. *United States* v. *Bennett,* 232 U. S. 299, shows that the power of the Federal Government with respect to taxation is not limited to the same extent as the taxing power of the States. The implication to be drawn from that case and *Cook* v. *Tait,* 265 U. S. 47, is that where the Federal Government affords a benefit there is power to tax. It is desirable that the constitutional question be settled promptly, for stock in domestic corporations is specifically required to be included in the gross estate by Section 303 (d), and there are at least two pending cases involving estates of nonresidents which include property of that character. *Estate of John Joseph Garvan* v. *Commissioner,* 25 B. T. A. 612, now pending in the Circuit Court of Appeals for the First Circuit upon petitions for review filed by both the Government and the taxpayer, and *Marshal Stearns, Administrator of the Estate of Carl Richard Heironymus,* v. *United States,* now pending in the Court of Claims.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

NOVEMBER, 1932.

APPENDIX

STATUTES AND REGULATIONS

Revenue Act of 1924, c. 234, 43 Stat. 253, 303, 304, 305:

SEC. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or nonresident of the United States:

[Here follow the rates.]

(U. S. C., Title 26, Sec. 1092.)

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * *

(U. S. C., Title 26, Sec. 1094.)

SEC. 303. For the purpose of the tax the value of the net estate shall be determined—

* * * * *

(b) In the case of a nonresident, by deducting from the value of that part of his

gross estate which at the time of his death is situated in the United States—

* * * * *

(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, * * *.

(e) The amount receivable as insurance upon the life of a nonresident decedent, and any moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of Part I of this title, be deemed property within the United States.

* * * * *

(U. S. C., Title 26, Sec. 1095.)

Treasury Regulations 68:

ART. 11. *Specific property to be included.*—The value of all real property situated in the United States and owned by the decedent at the date of his death should be included in the gross estate, whether the decedent was a resident or a nonresident, and whether the property came into the possession and control of the executor or administrator or passed directly to heirs or devisees. Where the decedent was a resident, the value of all personal property owned by him should be included, wherever situated. Where decedent was a nonresident, the value of so much of his personal property as had its situs in the United States at the time of his death should be included, and the value of his entire gross estate, wherever situated, should be disclosed, if deductions are claimed. (See Arts. 52 to 54.) As to the situs of the per-

sonal property of nonresident decedents, see Article 50.

* * * * *

ART. 50. *Situs of property of nonresident decedents.*—Real estate within the United States, stocks and bonds physically in the United States at date of death, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having a situs in the United States. As to the meaning of the term "United States," see Article 5. On the other hand, insurance upon the life of a nonresident, and moneys deposited by or for a nonresident not engaged in business in the United States at the time of his death with any person (for meaning of the term "person," see section 2 (a) (1) of the statute) carrying on the banking business in the United States, are not to be regarded as property situated therein.

* * * * *

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